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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BOBBY DARREN BAKER, Defendant and Appellant.	F071120 (Super. Ct. No. VCF295267) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

J. Peter Axelrod, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Kevin L. Quade, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Bobby Darren Baker, a juvenile, was charged with the murder of Richard Zepeda in the first degree (Pen. Code,[1] § 187, subd. (a) [count 1]) and gang conspiracy (§ 182.5 [count 2]). In connection with count 1, it was alleged he committed the offense for the benefit of, at the direction of, or in association with a gang (§ 186.22, subd. (b)) and a principal personally and intentionally discharged a firearm and proximately caused Richard's[2] death (§ 12022.53, subds. (d) & (e)(1)). In connection with counts 1 and 2, it was alleged defendant himself personally and intentionally discharged a firearm and proximately caused Richard's death (§ 12022.53, subd. (d)).

The jury found defendant guilty of the lesser included offense of second degree murder on count 1 and guilty as charged on count 2. It found true only the gang and vicarious firearm discharge allegations on count 1. The trial court imposed an aggregate sentence of 40 years to life: 15 years to life on count 1 plus 25 years to life for the firearm enhancement. The court stayed execution of the gang enhancement on count 1 and punishment on count 2.

Defendant makes several contentions in his opening brief: (1) the evidence did not support either conviction; (2) the trial court erroneously instructed the jury on aider and abettor liability; (3) the court erroneously prohibited defense counsel from mentioning his age in the summation; and (4) defense counsel rendered ineffective assistance by failing to object to the gang expert's testimony. In a supplemental brief, defendant argues Proposition 57, The Public Safety and Rehabilitation Act of 2016, which requires youths accused of committing crimes to have a hearing in juvenile court

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[1] Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

[2] To avoid confusion, we distinguish individuals who share surnames by their given names.

before they can be transferred to adult court, applies retroactively to his case.[3] For the reasons set forth below, we reject these claims and affirm the judgment.

STATEMENT OF FACTS

I. Prosecution's case-in-chief.

a. *Prologue*.

In October 2010, a group of Sureños opened fire on a group of Norteños in Woodlake. Ricardo Zepeda, a Sureño, shot and killed Anthony Cardenas[4], a Norteño. After Anthony's death, the Cardenas family "put a hit out on" Jorge Martinez (George)[5], who associated with Ricardo, the other Sureños involved in the shooting, and Sureños in general. Subsequently, various incidents arose at 337 East Antelope Avenue, where George lived with his family. Anthony's mother Isabel Cardenas repeatedly drove by the residence. Once, she dropped off a group of Norteños in front of the house. Periodically, individuals shouting "Norte" tried to enter the property and fight George. Shots were fired on three occasions. Liquor bottles and other items were thrown at the windows on seven occasions. Graffiti of the words "Vario Woodlake Loco" and the number "4" covered the fence. As a result of these incidents, the Martinez family installed an outdoor video surveillance system. In addition, George's father Jorge Martinez Saucedo began to carry a .38-caliber revolver.

Sometime during the week of January 18, 2013, George was taking out the trash when defendant, Martin Saldana, and two other males walked by the house and yelled

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[3] Proposition 57 also contains provisions relating to prison inmates, prison credits, and eased access to parole consideration. In this opinion, we deal exclusively with the changes implemented with respect to juveniles. (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 594, fn. 28 (*Cervantes*).)

[4] In the record, Anthony Cardenas was sometimes referred to as Anthony Medina.

[5] Jorge Martinez will be referred to as "George," and his father Jorge Martinez Saucedo will be referred to as "Jorge" to avoid confusion and to be consistent with the use of the names in the record so far as is possible.

"Norte." Defendant had tattoos of a single dot on one arm, four dots on the other arm, and the words "Woodlake," "Big Block," and "VWL" all over his arms and upper body. He told George, "I have something waiting for you. We got something for you." Defendant also proclaimed George "was going to get it." Saldana removed his shirt, exposing a "VWL" tattoo across his chest. Thereafter, the group departed.

b. *The night of Richard's murder.*

On February 1, 2013, at or around 7:00 p.m., upon returning home from work, George observed defendant, Saldana, and two other males walking across East Antelope Avenue and onto Olive Lane, an alley next to the Martinez residence. George went inside the house and alerted Jorge, who revealed he had seen the same men earlier that day at the neighboring park. Starting at or around 8:00 p.m., George and Jorge smoked and drank beer in the backyard. Jorge also patrolled the perimeter. Sometime before 8:30 p.m., two unidentified individuals tried to open the front gate but left after Jorge approached them with his revolver. At some point, the hammer of the gun jammed. George phoned his friend Jose Guijon and asked him to fix it. Ten minutes later, Guijon, Derek Renteria, and Ricardo's relative Richard arrived.[6] After Guijon repaired the revolver, he, Renteria, and Richard smoked and drank with George and Jorge in the backyard.

On February 2, 2013, sometime after midnight, George, Jorge, and Guijon spotted a hand reaching over the fence with a gun. Jorge ordered everyone to "[get] to the ground." The assailant fired at least seven times. Jorge returned fire. In the middle of the exchange, Renteria heard someone on the other side of the fence shout, "[T]hat's right, Norte." After the shooting ceased, George, Guijon, and Renteria went to Richard, who had sustained a bullet wound to the head and remained motionless on the ground.[7]

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[6] The record indicates Richard was either Ricardo's nephew or his cousin.

[7] The Martinez family's surveillance system captured footage before and after, but not during, the shooting. By design, the camera did not record continuously.

Jorge opened the side gate, saw two individuals on Olive Lane about 35 feet away, and fired at least twice. George, who followed, saw two other individuals running through the park. George and Renteria phoned 911. Richard ultimately died as a result of the head injury. A .22-caliber bullet was subsequently removed from his scalp.

At or around 12:30 a.m., Woodlake Police Officers Juan Garcia and Daniel Garibay were on patrol in separate vehicles near Sequoia Avenue and Pepper Street when they heard gunshots coming from the southeast. They were immediately dispatched to 337 East Antelope Avenue. Garcia drove directly to the residence and made contact with George, who was "hysterical." A .22-caliber bullet was found in the backyard. Meanwhile, Garibay searched the neighborhood for suspects. On Olive Lane near the Pomegranate Street intersection, he spotted a human silhouette about 50 feet away and Saldana lying on the ground about 10 feet away. The silhouette appeared to be running southbound toward Naranjo Boulevard. Garibay observed a bullet wound in Saldana's side. When asked who had shot him, Saldana remarked, "[T]hose fucking scraps . . . ." Garibay confiscated Saldana's cell phone but did not find a gun on Saldana's person or in the vicinity.

c. *Aftermath.*

On February 2, 2013, at or around 6:00 a.m., Isabel drove by the Martinez residence and "mad dogged" George. A month later, at Ricardo's sentencing hearing, she stated "she believed . . . karma would take care of [the] Zepeda[] family for what happened to her son."

Law enforcement searched defendant's residence and found a red San Francisco 49'ers cap, a Boston Red Sox cap with the letter "B," a Washington Nationals cap with the letter "W," and a Nebraska Cornhuskers cap with a red letter "N."

In a police interview, defendant acknowledged his nickname was "Bubba" and he used a cell phone with the number ending in 5914.[8] He "kick[ed] back with" "Northerners" and described "VWL" as his "family." Defendant explained the words "Big Block" referred to Woodlake. When asked whether he was aware of the incident that resulted in Saldana's injury, defendant said he heard about the injury from a "buddy" and suggested "[e]verybody" knew because Woodlake was a "[s]mall town." When asked about his whereabouts during the February 2, 2013, shooting, he replied, "I don't know . . . ."[9]

d. *Phone evidence*.

Multiple images were extracted from Saldana's cell phone. The first image showed defendant "[thr]owing a hand sign with a W," Cameron Hastings "throwing up the 4," and Saldana "also throwing up number 4 with his hand sign." They were accompanied by Saldana's relative Diego Rojas and Walter Maldonado. The second image showed Saldana "throwing the number 1 with his finger" and defendant "[thr]owing the 4 hand sign," forming the number "14." Saldana was also wearing a hat with the letter "B." The last image showed defendant and Maldonado displaying the letter "B" and the number "4," respectively. They were accompanied by Saldana.

Wireless carrier records exhibited the pinged locations of defendant's cell phone on February 1 and 2, 2013, during the hours before and after the shooting: Visalia at 11:01 p.m. and 11:03 p.m.; Exeter at 11:35 p.m.; and Woodlake between 11:43 p.m. and 3:24 a.m. Wireless carrier records also exhibited the pinged locations of Saldana's cell phone on February 1 and 2, 2013, during the hours before and after the shooting: Woodlake at approximately 6:30 p.m.; Visalia between 8:42 p.m. and 10:46 p.m.;

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8 The record shows a cell phone with the number ending in 5914 received numerous texts for "Bubba" from someone who identified herself as "mom" on February 2, 2013.

9 The jury listened to an audio recording of the interview.

Farmersville at 11:07 p.m. and 11:13 p.m.; Exeter at 11:29 p.m.; and Woodlake between 11:44 p.m. and 12:23 a.m.

On February 1, 2013, at 6:17 p.m., Saldana texted defendant, "U wanna mob[]to visa . . . [?]" At 6:19 p.m., defendant texted back, "Ight."[10] In text messages sent to Venecia Cardenas at 8:39 p.m., 9:12 p.m., and 9:14 p.m., defendant indicated he and Saldana were in Visalia.

California Highway Patrol (CHP) records showed defendant made a 911 call on February 2, 2013, at 12:36 a.m.[11] The call transcript reads:

"[Defendant]: Yeah the homie caught it.

"CHP Dispatch: 911.

"[Defendant]: Um we[']re right here on . . . Pomegranate. My friend got shot.

"CHP Dispatch: Okay. Where is this at? What city are you in?

"[Defendant]: On Pomegranate. [¶] . . . [¶] . . . Woodlake, California.

"CHP Dispatch: Stay on the phone for the police. Do not hang up.

"[Defendant]: All right, thanks.

". . . Saldana: I'm shot bro . . . I got shot bro. Call my brother bro. [¶] . . . [¶]

"[Defendant]: (Unintelligible) status big homie . . . . Did I hit high homie?" (Boldface, italics, & underlining omitted.)

Global Positioning System (GPS) coordinates placed the phone on Olive Lane.

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10 According to Tulare County Sheriff's Detective Steven Sanchez, the prosecution's gang expert (at p. 11, *post*), "mob" meant either "cruising [for sex]" or "going out looking for rival gang members," "visa" meant "Visalia," and "ight" meant "all right."

11 At trial, Woodlake Police Detective Jesus Mendez testified he knew and made repeated contact with defendant and Saldana for many years. He listened to the 911 call and confirmed the voices belonged to defendant and Saldana.

On February 2, 2013, between 1:23 a.m. and 1:50 a.m., defendant and Venecia engaged in the following text exchange:

"[Venecia:] Where you guys at?!?!

"[Defendant:] Ill hit u up later k.. mybad

"[Venecia:] Why?

"[Defendant:] Let me hit u up later gurl.. trust me n dnt b mad at me

"[Venecia:] Where you at tho!

"[Defendant:] I'm kew.. n at da broz [¶] . . . [¶]

"[Venecia:] Stay there. The cops are hellla hot right now."

Between 8:26 a.m. and 9:43 a.m., defendant and Saldana's girlfriend Anyssa[12] engaged in the following text exchange:

"[Anyssa:] Hey r u with martin . . . . [C]an u call me & let me know whats going on.? [¶] . . . [¶]

"[Defendant:] Hez n da hospital..

"[Anyssa:] Is he ok?? [¶] . . . [¶] Can u gimmie hiz broz # [¶] . . . [¶]

"[Defendant:] He got shot, bt hez kew

"[Anyssa:] Hes koo??so does he get to come home today?

"[Defendant:] Naa hez gnna be der 4 a while.. n hiz broz nt wit him

"[Anyssa:] Whoz with him?my bad for askin 21 questionz i jux wanna kno whats going on with him.

"[Defendant:] itz all good, dat my boy n hiz momz witem bt I dnt got her#"

Between 11:17 a.m. and 11:33 a.m., defendant and Isabel's husband or boyfriend Rudy Delgadillo engaged in the following text exchange:

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12 The record does not provide Anyssa's surname.

"[Defendant:] I talked 2 da homiez hefa[13] n she sed hez doing kew bro [¶] . . . [¶]

"[Delgadillo:] Dat he's doing good [¶] . . . [¶]

"[Defendant:] Ya g dat hez doing firme.. n she sounded like if it waz all good bro

"[Delgadillo:] Dats good my Bio. . . . [¶] So I just hope every thing ends up fine but well holla manana k."

Between 8:37 p.m. and 8:48 p.m., defendant and Anyssa engaged in another text exchange:

"[Defendant:] Yupp.. hez azleep rn tho

"[Anyssa:] Ok well tell him i miss him and to call me plz [¶] . . . [¶]

"[Defendant:] Dnt trip ill tell' em dnt trip [¶] . . . [¶]

"[Anyssa:] Thankz. Do u kno when ppl can go c him? [¶] . . . [¶]

"[Defendant:] Na bt ill find out.. dnt trip gurl ill holla atu whn I get sum mor info

"[Anyssa:] Thankz. [¶] . . . [¶]

"[Defendant:] Yuup"

Between 9:01 p.m. and 9:36 p.m., defendant and Hastings engaged in the following text exchange:

"[Hastings:] Watz gud g u coo

"[Defendant:] Yah I'm firme.. n u

"[Hastings:] Yee. They tryna say sum shit on us [¶] . . . [¶]

"[Defendant:] Let'em homie.. dey ain't got shit on uz

"[Hastings:] Simon limon the p.o didnt go to ur chantz today

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13 Sanchez testified "homiez hefa" referred to Saldana's mother.

"[Defendant:] Chale g.. [¶] . . . [¶] I thnk therz a kik bak.. ima find out g u wnna mob [¶] . . . [¶]

"[Hastings:] Na u need to kick back and stay home carnal [¶] . . . [¶]

"[Defendant:] Fuk homie.. I'm tryn get sum pussy b4 I go bak n u feel me

"[Hastings:] Na g if u or me get caught slippn itz all bad im tryna go to poros

"[Defendant:] Watz up out der

"[Hastings:] Natha just so I aint home wen they come [¶] . . . [¶]

"[Defendant:] I ain't gonna mob den g .."[14]

Between 10:24 p.m. and 11:01 p.m., defendant and Maggie Garcia engaged in the following text exchange:

"[Garcia:] . . . I'm just hella sad right now foo I don't want Martin to do time [¶] Or u niether Bubba serio u out of da homiez is hella koo n I got much luv for ya n idk its crazy foo. . . . [¶] . . . [¶]

"[Defendant:] Dnt trip gurl.. it iz wat it iz [¶] . . . [¶]

"[Garcia:] U koo Bubbah? I knw kibkib[15] is hella strong n is a righteous ass homie but I just hope for the best n prepare for the worse [¶] . . . [¶]

"[Defendant:] Allllll day. Itz watevr ima homie u feel me?? Wat m I gnna do [¶] . . . [¶]

"[Garcia:] I knw u a homie I feel u but homiez got feelings too u feel me I'm just saying if u need anything I'm here ight no matter wat foo serio

"[Defendant:] Ight thnx maggie 4 everything.. u hella firme to da fullezt n I respect dat serio [¶] . . . [¶]

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14 Sanchez testified "the p.o didnt go to ur chantz today" meant "[t]he probation officer didn't go to [defendant's] house today," "[c]hale g" meant "no," and "poros" meant "Porterville."

15 Sanchez testified "kibkib" referred to Saldana.

"[Garcia:] Ur welcome homie I luv u foo never for get that. N I will always have ur bk to da fullest weather u here or behind walls I got u. U can count on that [¶] . . . [¶]

"[Defendant:] Datz rght likewize maggie.. much luv n respect n full my gurl"

On February 5, 2013, at 12:15 p.m., Garcia texted defendant, "I JUST GOT WORD THAT MENDEZ N WPD[16] IZ AT COURT HOUZE GETTING LOTZ OF ZEARCH WARRENTZ FOR DA BLOCK ZO HEADZ UP HOMIEZ ZPREAD WORD"

e. *Gang expert testimony.*

Sanchez, the prosecution's gang expert, testified the Norteños are a criminal street gang whose primary activities include unlawful homicide, assault with a deadly weapon, robbery, carjacking, and possession of controlled substances for sale.[17] Members wear red attire and identify with the letter "N," which stands for "Norte," "Northern," and "Norteño," and the numbers "1," "4," and "14."[18] Norteños territorialize the area north of Delano while the rival Sureños territorialize the area south of Delano. Norteños refer to Sureños pejoratively as "scraps" and commonly replace the letter "S" with the letters "X" or "Z" or the symbol "$" in words.

Over 3,000 documented Norteños and Norteño associates reside in Tulare County. In particular, the Norteño subset VWL, which stands for "Vario Woodlake Locos," has 20 to 30 active members in Woodlake. Subset members wear attire displaying the letters "W" and "B," which stand for "Woodlake" and "Big Block," respectively. Delgadillo and at least one member of the Cardenas family have "high status" within VWL.

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16 Sanchez testified "WPD" referred to the Woodlake Police Department. Based on the record, "MENDEZ" is likely Detective Mendez. (See *ante*, fn. 11.)

17 Sanchez confirmed various documented Norteños were previously convicted of murder and robbery.

18 Sanchez explained the significance of the numbers: "1-4, together they are 14. It all comes back to the 14th letter of the alphabet which is N for Norte[ñ]o."

According to Sanchez, in deciding whether to document someone as a gang member, law enforcement considers whether the person (1) admitted being a gang member; (2) was identified as a gang member by a reliable source; (3) associated with gang members; (4) was in or possessed gang-related photographs; (5) was involved in a gang-related crime; (6) was identified in a gang-related correspondence; (7) had gang-related tattoos; (8) wore gang-related clothing or attire; (9) wrote or possessed gang-related material; and (10) admitted being a gang member while in a custodial facility. One is classified as a gang member when at least three of the criteria are satisfied.

Based on various reports, field identification cards, discussions with other police officers, defendant's interview, and other research, Sanchez concluded defendant was an active Norteño at the time of the crime. Defendant admitted being a Norteño and his probation officer identified him as a Norteño. He associated with documented Norteños, including Delgadillo, Hastings, Maldonado, Rojas, Julian Cardenas, Rodrigo Garcia, Hector Morales, Garrett Poole, and Walden Valdovinos. Defendant was in and possessed gang-related photographs. He was involved in a gang-related drive-by shooting on November 9, 2011, participated in a fight against Sureños on January 27, 2012, and graffitied on January 18, 2013. Finally, defendant had gang-related tattoos and attire.

Based on various reports, field identification cards, discussions with other police officers, and other research, Sanchez concluded Saldana was an active Norteño at the time of the crime. Saldana admitted he fraternized with "northern gangs." He associated with documented Norteños, including Hastings, Maldonado, Morales, Poole, Rojas, Jordan Guzman, and Samuel Rivas. Saldana was in and possessed gang-related photographs. He threatened a Norteño "drop out" "who [wa]s no longer in good standing[] with the gang" with a bat on August 19, 2011; participated in a fight against Sureños on January 27, 2012; assaulted a Sureño on June 6, 2012; and graffitied on January 18, 2013. Finally, Saldana had gang-related tattoos and attire, including a black T-shirt displaying the Roman numeral "XIV" and the phrase "fuck scraps"; a red and

white T-shirt displaying the words "NorCal"; a red bandana; a red beanie; a hat displaying a red letter "N"; and another hat displaying the letter "B."

Sanchez opined Richard's murder on February 2, 2013, was gang related. Amid the gunfire, Renteria heard someone on the other side of the fence yell "Norte." In addition, defendant and Saldana were together and in close proximity to the Martinez residence before, during, and after the shooting. Although the murder weapon was never found, Sanchez noted "it is common for gang members to give the gun off to fellow gang members so . . . it is not discovered by law enforcement." He believed the shooting was "revenge for [Anthony]'s death." Sanchez pointed out (1) George associated with Ricardo; (2) Richard was related to Ricardo; (3) defendant consorted with members of the Cardenas family; (4) hours after the shooting, Isabel drove by the Martinez residence; (5) Isabel alluded to Richard's death at Ricardo's sentencing hearing; and (6) Isabel and Delgadillo attended defendant's preliminary hearing and/or trial.

In response to a hypothetical question posed by the prosecutor, Sanchez opined the killing of an individual—a relative of a Sureño who killed a Norteño—at the home of a Sureño associate by two Norteños promotes, benefits, and furthers the gang. He explained:

> "Gang members act violently and commit retaliating crimes. The fact that these subjects committed a homicide on a perceived rival gang member or a family member of some one that was involved in a previous homicide of one of their own shows that gang members are going to retaliate. . . . The fact that [two] gang members are together when they do this homicide, the gang is going to know about it. They are going to know that these are the ones that committed the crime for the gang.
>
> "A homicide is a huge crime within the gang. It is going to boost their status within the gang. They are going to be held to much higher respect within the gang. [The two gang members and the gang as a whole] are going to be feared by rival gang members because they know that these gang members are willing to commit homicide and you don't want to mess with them. [¶] . . . [¶]

> ". . . [T]he gang is going to be feared. They are going to know the Southerners aren't going to want to do crimes against the rival gang because they know that they are going to be a retaliation. Gang members gain their respect off of fear.
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> "Unlike normal citizens, we gain respect from having a nice house, earning a degree, having a nice job, that is how we gain respect. Gang members gain respect by their fear. They are feared by the community, they are feared by rival gang members and to get that fear they commit violent crimes . . . . And that is their respect for them."

Sanchez also opined such a killing "would have been in association with or at the direction of or to assist gang members and criminal conduct":

> "[J]ust the fact that you have got [two] validated gang members committing a crime together, the crime of homicide, it would definitely be in association with the gang. Gang members typically don't commit crimes by themselves. They always commit crimes in numbers with at least two or more persons. This is because gang members are going to have a witness. His homie is going to say yeah he put in work, he put in the work. It is a witness to that, for them to the gang that they commit crimes. [¶] . . . [¶]
>
> ". . . Gang members will assist other gang members by taking the firearm used in a crime and they will hide it. So law enforcement can't discover. [¶] . . . [¶]
>
> ". . . [The killing] was definitely in direction of the gang because this was a direct hit for the gang as a result of a retaliation for [the earlier killing of a fellow Norteño]."

II. Defense's case-in-chief.

Hastings and his wife Olivia Ortega testified for the defense. According to Hastings, defendant visited their home on the night of Richard's murder, arriving at around 11:30 p.m. and leaving an hour later. Ortega remembered defendant dropped by their home two years earlier but could not specify the exact date.

A few days after defendant's visit, Hastings heard about the shooting for the first time via social media. He denied being a gang member. Concerning the "Big Block" tattoo on his neck, Hastings said the words referred to his Chevrolet Impala as well as the notion that "size matters."

DISCUSSION

I. Substantial evidence supported defendant's convictions on counts 1 and 2.

a. *Standard of review.*

"To determine the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the prosecution to determine whether it contains [substantial] evidence that is reasonable, credible[,] and of solid value, from which a rational trier of fact could find that the elements of the crime were established beyond a reasonable doubt." (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955 (*Tripp*).) We "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) "We need not be convinced of the defendant's guilt beyond a reasonable doubt; we merely ask whether ' "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.]' [Citation.]" (*Tripp, supra*, at p. 955, italics omitted.)

"Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis what[so]ever is there sufficient substantial evidence to support it." (*People v. Redmond, supra*, 71 Cal.2d at p. 755.) " 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' [Citation.]" (*People v. Lee* (2011) 51 Cal.4th 620, 632.)

"This standard of review . . . applies to circumstantial evidence. [Citation.] If the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury's findings, our opinion that the circumstances might also

reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]" (*Tripp*, *supra*, 151 Cal.App.4th at p. 955.)

b. *Analysis – murder conviction.*

" '[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295-296.) "[P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) " 'Whether a person has aided and abetted in the commission of a crime ordinarily is a question of fact. . . . [¶] . . . [¶] Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054 (*Nguyen*); accord, *People v. Perryman* (1967) 250 Cal.App.2d 813, 820.)

The record, viewed in the light most favorable to the prosecution, shows defendant and Saldana are Norteños. They and two other males yelled "Norte" and confronted George outside his home during the week of January 18, 2013. George was a known associate of a Sureño (Ricardo) who shot and killed a Norteño (Anthony) some years earlier. Before leaving, defendant announced the group "got something for [George]" and George "was going to get it." Approximately two weeks later, on February 1, 2013, George and Jorge saw defendant, Saldana, and two other males in close proximity to their house. Later that day, Guijon, Renteria, and Ricardo's relative Richard dropped by the

residence. About a half an hour past midnight, as George, Jorge, and their guests were drinking and smoking in the backyard, an unidentified assailant opened fire. Either this assailant or a cohort shouted, "[T]hat's right, Norte." After the shooting ceased, George and Jorge exited the backyard and observed two pairs of individuals fleeing the scene in opposite directions. George saw one pair sprinting through the park. Jorge saw the other running away on Olive Lane, fired his revolver, and struck one of them. At 12:36 a.m., defendant phoned 911 and reported Saldana's injury: a gunshot wound. Based on GPS coordinates, defendant was on Olive Lane at the time of the call. Shortly thereafter, at the intersection of Olive Lane and Pomegranate Street, Garibay encountered an incapacitated Saldana and spotted the silhouette of another person running. Ensuing text messages on defendant's phone demonstrated (1) within an hour of the shooting, defendant deliberately hid; (2) defendant communicated with various Norteños and Norteño associates, including members of Anthony's family (the Cardenases), about his whereabouts and Saldana's status; and (3) these Norteños and Norteño associates urged defendant to remain inconspicuous, apprised him of police activity, and/or pledged unconditional support. At trial, Sanchez described the enmity between Norteños and Sureños and the practice of Norteños to perpetrate murder and other violent crimes against those "involved in a previous homicide of one of their own" as retribution, noting the conduct and remarks of Isabel (Anthony's mother) in the wake of Richard's death. (See *Nguyen*, *supra*, 61 Cal.4th at p. 1055 [gang evidence may strengthen inferences arising from other evidence specific to a defendant's role in a crime].)

From these facts, a rational jury could have inferred (1) the gunman and defendant were two of the four individuals who fled the scene immediately after the shooting; (2) the gunman was a Norteño or a Norteño sympathizer; (3) defendant, a Norteño and ally of the Cardenas family, was aware of the gunman's unlawful purpose and intended to encourage or facilitate the shooting (see *Nguyen*, *supra,* 61 Cal.4th at p. 1055 [" 'Evidence of a defendant's state of mind is almost inevitably circumstantial, but

circumstantial evidence is as sufficient as direct evidence to support a conviction.' "]); and (4) defendant acted in a manner that encouraged or facilitated the shooting, e.g., by surveying the Martinez residence, the adjacent alley, and the nearby park before the shooting.

c. *Analysis – gang conspiracy conviction.*

"[A]ny person who actively participates in any criminal street gang . . . with knowledge that its members engage in or have engaged in a pattern of criminal gang activity . . . and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony . . . ." (§ 182.5; accord, *People v. Johnson* (2013) 57 Cal.4th 250, 259.)

The record, viewed in the light most favorable to the prosecution, shows defendant is an admitted Norteño who has himself engaged in gang-related criminal activity. As we concluded earlier, substantial evidence established he aided and abetted Richard's murder, which was in retaliation for Anthony's death in 2010. At trial, Sanchez testified the individual Norteños who participate in the killing of a rival gang member gain greater respect and status within the gang. Furthermore, the gang as a whole benefits from the homicide because the homicide implants fear within the rival gang and the community at large. From these facts, a rational jury could have inferred defendant (1) was an active Norteño; (2) was aware the Norteños engage in a pattern of criminal activity; and (3) willfully promoted, furthered, assisted, or benefitted from Richard's shooting death.

II. The trial court correctly instructed the jury on aider and abettor liability.

a. *Background.*

At the jury instruction conference, the trial court indicated it would issue CALCRIM Nos. 400 (Aiding and Abetting: General Principles) and 401 (Aiding and Abetting: Intended Crimes). Defendant's attorney, objected:

> "MR. BIANCO: Again, I have a problem in that he is the accused. Who did he aid and abet?

"THE COURT: Well it could be interpreted that the other guy was the shooter and . . . defendant was with him.

"MR. BIANCO: Well is he aiding and abetting some one else or is he aiding and abetting him?

"THE COURT: He is abetting the other guy that got shot. The other guy that got shot could have been the shooter and so if he was with him and assisted him. I am going to give it over your objections, Mr. Bianco."

Before closing arguments, the court read CALCRIM Nos. 400 and 401 to the jury:

"A person may be guilt[y] of a crime in two ways. [One], he or she may have directly committed the crime. I will call that person the perpetrator. [Two], he or she may have aided and abetted a perpetrator[,] who directly committed the crime. A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.

"To prove that the defendant is guilty of a crime based on aiding and abetting that crime[,] the People must prove that:

"[One], the perpetrator committed the crime[;]

"[Two], the defendant knew that the perpetrator intended to commit the crime[;]

"[Three], before or during the commission of the crime[,] the defendant intended to aid and abet the perpetrator in committing the crime[;]

"And [four], the defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

"Some one aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to[,] and does in fact[,] aid, facilitate, promote, encourage[,] or instigate the perpetrator's commission of that crime.

"If all of these requirements are proved, defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.

"If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the

fact that a person is present at the scene of a crime or fails to prevent the crime does not[,] by itself[,] make him or her an aider or abettor."

In her summation, the prosecutor asserted defendant could be found criminally liable as an aider and abettor.

b. *Standard of review*.

"A claim of instructional error is reviewed de novo." (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 759, citing *People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.)

c. *Analysis*.

"Even without a request, a trial court is obliged to instruct on ' "general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case" ' [citation], or put more concisely, on ' "general legal principles raised by the evidence and necessary for the jury's understanding of the case" ' [citation]. In particular, instructions delineating an aiding and abetting theory of liability must be given when such derivative culpability 'form[s] a part of the prosecution's theory of criminal liability and substantial evidence supports the theory.' [Citation]." (*People v. Delgado* (2013) 56 Cal.4th 480, 488.) In this context, "[s]ubstantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive. [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

We conclude an instruction on aider and abettor liability was proper. First, "such derivative culpability 'form[ed] a part of the prosecution's theory of criminal liability.' " (*People v. Delgado, supra*, 56 Cal.4th at p. 488.) Second, contrary to defendant's view, the evidence needed to justify a particular instruction is less than the evidence needed to support a verdict. (Cf. *National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 419-420, fn. 2 [" ' "The evidence necessary to justify the giving of an instruction need not be overwhelming . . . [but] may be slight . . . or even

opposed to the preponderance of the evidence." ' "].) Because substantial evidence supported defendant's conviction for murder as an aider and abettor (see *ante*, at pp. 15-18), the same evidence necessarily justified the corresponding instruction.

III. The trial court did not abuse its discretion when it prohibited defendant's attorney from mentioning defendant's age in his summation.

a. *Background*.

Near the end of jury selection, the prosecutor asked the trial court to exclude evidence of defendant's age. The court responded:

> "I'm going to tell [the jurors] how old [defendant] is and they are not to consider it. He is being prosecuted as an adult. [¶] . . . [¶] . . . I will just tell them [the homicide] occurred when he was 16. He is considered an adult for purposes of prosecution because of the nature of the offense."

Before trial commenced, the court issued CALCRIM No. 101 (Cautionary Admonitions: Jury Conduct (Before, During, or After Jury Is Selected)), which warned the jury "not [to] let bias, sympathy, prejudice or public opinion influence [its] decision."

Michael Wallace, defendant's probation officer, testified for the prosecution. He chronicled defendant's time in juvenile hall.[19] On cross-examination, defendant's counsel asked for defendant's birthdate. The prosecutor raised a relevance objection, which was overruled. Wallace testified defendant was born on March 5, 1996, and was approximately 14 years old when he was first taken into custody. Later, the jury listened to an audio recording of defendant's police interview. (See *ante*, fn. 9.) At the beginning of the interview, defendant confirmed he was born on March 5, 1996.

After close of evidence and before summations, the court issued CALCRIM No. 200 (Duties of Judge and Jury):

> "Do not let bias, sympathy, prejudice[,] or public opinion influence your decision. Bias includes[,] but is not limited [to,] bias for or against the

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19 Defendant's attorney also elicited testimony touching on defendant's time in juvenile hall throughout trial.

witnesses, attorneys, defendant[,] or alleged victim based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age[,] or socioeconomic status."

Before defendant's closing argument, the prosecutor asked his attorney to refrain from mentioning defendant's age. The following colloquy ensued:

"MR. BIANCO: . . . Now my client's age, I think that is a fact, . . . that is evidence. It has . . . been brought up so I can talk about that.

"THE COURT: Well what is the relevance of it?

"MR. BIANCO: Really I don't have to talk about relevancy in my argument to the jury.

"THE COURT: Sure, it has to be relevant. Arguing that he was 16 at the time of the incident is a plea for sympathy and I am not going to allow it.

"MR. BIANCO: . . . Your Honor, I can talk about [how] he got out of [j]uvenile [h]all. [The prosecutor] did. That means he was under 17, under 18, that he went in when he was –

"THE COURT: So what? That is not relevant.

"MR. BIANCO: Well did [the prosecutor] bring it up?

"THE COURT: [The prosecutor] brought it up that he was released from [j]uvenile [h]all. She didn't talk about his age. I am not going to allow you to talk about his age when this occurred. It is not relevant. I mean that is a direct plea for sympathy and [the jurors] are not to consider that. They all indicated that his age wasn't relevant [and] they wouldn't consider it. So you are not going to argue. [¶] . . . [¶]

"MR. BIANCO: I can talk about his age.

"THE COURT: No, you can't. It is not relevant. It is not relevant. You can't talk about the fact he was only 16. That is not relevant. I am not going to allow it. That is a straight plea for sympathy based on his age. He is being tried as an adult. The fact that he was 16 is not relevant.

"MR. BIANCO: I believe the court has advised the jury the fact that he is an adult.

"THE COURT: I have.

"MR. BIANCO: And he is a minor being tried as an adult, you brought that up.

"THE COURT: I brought it up because you guys asked me to and we had to get a commitment from the jurors that they would not consider it. So I am not going to argue it any more, Mr. Bianco, it is not to be argued. That is my ruling.

"MR. BIANCO: All right."

b. *Standard of review*.

Section 1044 "vests the trial court with broad discretion to control the conduct of a criminal trial." (*People v. Calderon* (1994) 9 Cal.4th 69, 75.) "When there is no patent abuse of discretion, a trial court's determinations under section 1044 must be upheld on appeal." (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1334, citing *People v. Calderon*, *supra*, at p. 79; see *People v. Kipp* (1998) 18 Cal.4th 349, 371 ["A court abuses its discretion when its ruling 'falls outside the bounds of reason.' "].)

c. *Analysis*.

"It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044; see *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1184 ["It is firmly established that a criminal defendant has a constitutional right to have counsel present closing argument to the trier of fact. [Citations.] Nonetheless, it is equally settled that a judge in a criminal case 'must be and is given great latitude in controlling the duration and limiting the scope of closing summations.' "].)

We conclude the court did not abuse its discretion when it prohibited defense counsel from mentioning defendant's age in his summation. When questioned about the pertinence of doing so, counsel replied, "I don't have to talk about relevancy in my argument to the jury." Moreover, he did nothing to dispel the court's concern that a reference to defendant's age was intended to appeal to the jurors' sympathies. Rather

than offer a material purpose, counsel stated he was entitled to bring up defendant's age because the matter was directly and indirectly introduced in the course of trial.[20] Given the circumstances, the court did not act unreasonably.

IV. Defendant's claim of ineffective assistance of counsel must be rejected because the appellate record does not shed light on why his counsel acted or failed to act in the challenged manner.

To establish ineffective assistance of counsel, a defendant must show (1) defense counsel did not provide reasonably effective assistance in view of prevailing professional norms; and (2) defense counsel's deficient performance was prejudicial. (See *People v. Oden* (1987) 193 Cal.App.3d 1675, 1681, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) "It is . . . particularly difficult to establish ineffective assistance of counsel on direct appeal, where we are limited to evaluating the appellate record. If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

The record before us " 'does not illuminate the basis for the attorney's challenged acts or omissions . . . .' " (*People v. Silvey* (1997) 58 Cal.App.4th 1320, 1329.) Trial counsel was never asked to explain why he did not object to certain portions of Sanchez's testimony attributing Richard's death to defendant and Saldana. Furthermore, " ' "[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel" [citation].' [Citation.]" (*People v. Gurule* (2002)

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20 On appeal, defendant claims trial counsel "was most probably concerned with the negative inference the jury was likely to draw from evidence of his age." If true, then that point should have raised below. (See *People v. Welch* (1999) 20 Cal.4th 701, 739 ["We review the correctness of the trial court's ruling at the time it was made . . . ."].) Furthermore, the risk of prejudice was offset by the court's instructions. "Jurors are presumed to understand and follow the court's instructions." (*People v. Holt* (1997) 15 Cal.4th 619, 662; accord, *People v. Perez* (2016) 3 Cal.App.5th 812, 825.)

28 Cal.4th 557, 609-610; see *People v. Jones* (2003) 29 Cal.4th 1229, 1254 [“ ‘ “[T]here is a ‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’ ” ’ ”]; *People v. Riel* (2000) 22 Cal.4th 1153, 1185 [“ ‘Generally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight. . . . A reviewing court will not second-guess trial counsel’s reasonable tactical decisions.’ ”].) Accordingly, we reject defendant’s claim of ineffective assistance of counsel.

V. Proposition 57 does not apply retroactively.

a. *Background.*

At the time of the offenses, defendant was 16 years old. The criminal action was directly filed in adult criminal court. Defendant was convicted on December 12, 2014. He filed a notice of appeal on February 23, 2015, and the case was fully briefed on December 23, 2015. On November 8, 2016, while the appeal was pending, Proposition 57 was passed by the voters. It took effect the next day. (See Cal. Const., art. II, § 10, subd. (a).)

Defendant argues Proposition 57 applies retroactively, allowing him to receive a transfer hearing in juvenile court.

b. *Analysis*

Whether the voters intended Proposition 57 to apply retroactively is a question of law. (*People v. Mendoza* (2017) 10 Cal.App.5th 327, 344 (*Mendoza*); cf. *People v. Arroyo* (2016) 62 Cal.4th 589, 593 [interpretation of Prop. 21].)

“Historically, California required a judicial determination of unfitness for juvenile court before a minor could be prosecuted in adult court. [Citations.] Beginning [with the passage of Proposition 21] in March 2000 and continuing until the adoption of Proposition 57, however, the district attorney was authorized, as a matter of executive discretion, to file a criminal action against a juvenile in certain defined circumstances, rather than filing the case in juvenile court, a practice known as ‘direct filing’ or

'discretionary direct filing.' [Citations.] Some crimes . . . were considered so serious by the voters that, if committed by a minor age 14 or older, juvenile court was not an option; filing in adult criminal court was mandated by statute ('mandatory direct filing'). [Citations.]" (*Cervantes, supra*, 9 Cal.App.5th at pp. 595-596, fn. omitted.)

"Proposition 57 was designed to undo Proposition 21. After the passage of Proposition 57, the charging instrument for all juvenile crimes must be filed in juvenile court. [Citation.] While prosecuting attorneys may move to transfer certain categories of cases to criminal court [citation], they have no authority to directly and independently file a criminal complaint against someone who broke the law as a juvenile, even by committing the crimes that previously qualified for mandatory direct filing. In cases where transfer to adult court is authorized [citation] (and not all cases qualify), the juvenile court now has sole authority to determine whether the minor should be transferred. [Citations.] Thus, Proposition 57 effectively guarantees a juvenile accused felon a right to a fitness hearing before he or she may be sent to the criminal division for prosecution as an adult." (*Cervantes, supra*, 9 Cal.App.4th at pp. 596-597, fn. omitted; accord, *People v. Marquez* (May 16, 2017, F070609) ___ Cal.App.5th ___, ___ [2017 Cal.App. Lexis 440, *5] (*Marquez*); see Welf. & Inst. Code, §§ 602, 707.)

The question before us is whether Proposition 57 applies retroactively. Defendant argues in the affirmative; the Attorney General disagrees. We agree with the Attorney General.

"When interpreting the meaning of laws passed by voter initiative, the court's analysis is governed by the voters' intent." (*People v. Martin* (2016) 6 Cal.App.5th 666, 674; see *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1212 (*Evangelatos*) [initiative measures are subject to ordinary rules and canons of statutory construction]; *Cervantes, supra*, 9 Cal.App.5th at p. 603 [same].) We "first look to 'the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.' [Citations.]" (*People v. Park* (2013) 56 Cal.4th 782, 796.) If the

language is ambiguous, " 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citation.]" (*People v. Rizo* (2000) 22 Cal.4th 681, 685.)

The statutory language of Proposition 57 does not expressly address prospective or retroactive application. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, §§ 4, 4.1, 4.2, pp. 141-145; accord, Welf. & Inst. Code, §§ 602, 707.) Neither party contests this fact. However, defendant contends retroactive intent can be inferred from broadly and liberally construing the initiative's stated purposes of "[s]av[ing] money by reducing wasteful spending on prisons," "[s]top[ping] the revolving door of crime by emphasizing rehabilitation, especially for juveniles," and "[r]equir[ing] a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 57, § 2, p. 141.) "But even broadly construed, none of the[se] stated purposes provide a reference to timing from which retroactive intent can be inferred. In fact, there is arguably textual support for an inference of *prospective* intent. One stated purpose is to require judges rather than prosecutors to decide 'whether juveniles *should be* tried in adult court.' [Citation.] That statement suggests an intent that Proposition 57 apply only to cases that have not already been tried. At most, the text of Proposition 57 is ambiguous." (*Mendoza*, *supra*, 10 Cal.App.5th at pp. 344-345; see Welf. & Inst. Code, § 707, subd. (a)(2) ["[T]he juvenile court shall decide whether the minor *should be* transferred to a court of criminal jurisdiction." italics added]; Voter Information Guide, Gen. Elec., *supra*, official title and summary of Prop. 57, p. 54 ["Provides juvenile court judges shall make determination, upon prosecutor motion, whether juveniles age 14 and older *should be* prosecuted and sentenced as adults for specified offenses." italics added]; *id.*, analysis of Prop. 57 by Legis. Analyst, pp. 55-56 ["A prosecutor can request a hearing in which a juvenile court judge decides whether a youth *should be* transferred to adult court. . . . [¶] . . . [¶] . . . The measure changes state law to require that, before youths can be transferred to adult

court, they must have a hearing in juvenile court to determine whether they *should be* transferred." italics added]; *id.*, argument in favor of Prop. 57, p. 58 ["Requires judges instead of prosecutors to decide whether minors *should be* prosecuted as adults, emphasizing rehabilitation for minors in the juvenile system. [¶] . . . Prop. 57 focuses on evidence-based rehabilitation and allows a juvenile court judge to decide whether or not a minor *should be* prosecuted as an adult." italics added].)

"It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate . . . intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287; see *Evangelatos*, *supra*, 44 Cal.3d at pp. 1208-1209 ["California continues to adhere to the time-honored principle, codified by the Legislature in Civil Code section 3 and similar provisions[, e.g., Penal Code section 3, Code of Civil Procedure section 3], that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application."].) "In applying this principle, we have been cautious not to infer retroactive intent from vague phrases and broad, general language in statutes." (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*).) "Consequently, ' "a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective." ' [Citation.]" (*Id.* at p. 320.) Based on our examination of Proposition 57's language and ballot materials, "there is no reason to believe that the electorate harbored any specific thoughts or intent with respect to the retroactivity issue at all." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1212.)

Notwithstanding the presumption of prospective operation in the absence of retroactive intent, our Supreme Court established "an important, contextually specific qualification . . . : When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are

not yet final on the statue's operative date." (*Brown, supra,* 54 Cal.4th at p. 323, fn. omitted, citing *In re Estrada* (1965) 63 Cal.2d 740, 742-748 (*Estrada*).) Defendant maintains, in view of the *Estrada* rule, Proposition 57 applies retroactively because it reduces punishment. We disagree.

In *Estrada,* the defendant had been convicted of being under the influence of narcotics, a misdemeanor. In lieu of incarceration, he was committed to a rehabilitation center. The defendant escaped from the center but was recaptured. He pled guilty to escape without force or violence, an offense punishable by a minimum one-year sentence to commence from the time he would have been discharged. In addition, under a separate penal provision, the defendant could not be eligible for parole until he served at least two years from and after the date of his return to custody. (*Estrada, supra,* 63 Cal.2d at pp. 742-743.) Between the time of the escape and the time of sentencing, the governing statutes were amended to reduce the minimum term to six months and eliminate the two-year waiting period for parole consideration. (*Id.* at pp. 743-744.) The defendant argued he was "entitled to the ameliorating benefits of the statutes as amended . . . ." (*Id.* at p. 744.) The Supreme Court agreed:

> "If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies. [¶] . . . [¶]
>
> ". . . When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology. . . .

> " '. . . A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance. As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts.' " (*Estrada*, *supra*, 63 Cal.2d at pp. 744-746.)

Later, in *Brown*, the Supreme Court clarified the scope of the *Estrada* rule. In that case, the defendant was sentenced to three years in state prison. Pursuant to the version of section 4019 in effect at the time of sentencing, he received 62 days of credit for actual time spent in local custody and 30 days of credit for good behavior. Thereafter, the provision was temporarily revised to increase the rate at which prisoners in local custody could earn conduct credits for good behavior. Defendant filed a petition for rehearing claiming additional conduct credits under the amended provision. The Third Appellate District granted the petition, vacated its earlier decision, and issued a new decision awarding him additional conduct credits. The People challenged the decision. (*Brown*, *supra*, 54 Cal.4th at pp. 317-319.)

The Supreme Court rejected, inter alia, the defendant's assertion the *Estrada* rule mandated the retroactive application of the revised section 4019. (*Brown*, *supra*, 54 Cal.4th at pp. 323-324.) The high court explained:

> "Applied broadly and literally, *Estrada*[] . . . would . . . endanger the default rule of prospective operation. Recognizing this in *Evangelatos*, we . . . held that 'language in *Estrada* . . . should not be interpreted as modifying this well-established, legislatively-mandated principle' (*Evangelatos*, [*supra*, 44 Cal.3d] at p. 1209; see generally *id.* at pp. 1207-1209 & fn.11.) Accordingly, *Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation . . . , but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments. . . .

"This brings us to the question whether the rule of *Estrada* . . . requires us to apply retroactively a statute increasing the rate at which prisoners may earn credit for good behavior. The question can properly be answered only in the negative. The holding in *Estrada* was founded on the premise that ' "[a] legislative mitigation of the penalty *for a particular crime* represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law" ' [citation] and the corollary inference that the Legislature intended the lesser penalty to apply to crimes already committed. In contrast, a statute increasing the rate at which prisoners may earn credits for good behavior does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent. Former section 4019 does not alter the penalty for any crime; a prisoner who earns no conduct credits serves the full sentence originally imposed. Instead of addressing punishment for past criminal conduct, the statute addresses *future conduct* in a custodial setting by providing increased incentives for good behavior.

"Defendant contends the rule of *Estrada* . . . should be understood to apply more broadly to any statute that reduces punishment in any manner, and that to increase credits is to reduce punishment. Defendant's argument fails for two reasons: First, the argument would expand the *Estrada* rule's scope of operation in precisely the manner we forbade in *Evangelatos*, *supra*, 44 Cal.3d [at p.] 1209. Second, the argument does not in any event represent a logical extension of *Estrada*'s reasoning. We do not take issue with the proposition that a convicted prisoner who is released a day early is punished a day less. But, as we have explained, the rule and logic of *Estrada* is specifically directed to a statute that represents ' "a legislative mitigation of the *penalty for a particular crime*" ' (*Estrada*, [*supra*, 63 Cal.2d] at p. 745, italics added) because such a law supports the inference that the Legislature would prefer to impose the new, shorter penalty rather than to ' "satisfy a desire for vengeance" ' (*ibid.*). The same logic does not inform our understanding of a law that rewards good behavior in prison." (*Brown*, *supra*, 54 Cal.4th at pp. 324-325, fns. omitted.)

Likewise, the *Estrada* rule is inapplicable in the instant case. Proposition 57 does not " ' "mitigat[e] . . . the penalty *for a particular crime*." ' " (*Brown*, *supra*, 54 Cal.4th at p. 325; accord, *Marquez*, *supra*, ___ Cal.App.5th at p. ___ [2017 Cal.App. LEXIS 440, *15]; *Mendoza*, *supra*, 10 Cal.App.5th at p. 348; see *Cervantes*, *supra*, 9 Cal.App.5th at p. 602 ["Proposition 57 mitigates the penalty for a particular crime even less directly than

the jail credits at issue in *Brown*."].) It "amends the Welfare and Institutions Code to create a presumption that all individuals under the age of 18 come within the jurisdiction of the juvenile court (Welf. & Inst. Code, § 602), and provides a procedural method for prosecutors to move to transfer a juvenile case to adult court ([*Id*.,]§ 707, subd. (a)(1))." (*Mendoza, supra*, at p. 348.)[21] In other words, Proposition 57 "affect[s] who perform[s]

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[21] In his supplemental brief, defendant states Proposition 57 "giv[es] juvenile courts exclusive jurisdiction over all juveniles." This is inaccurate.

> Welfare and Institutions Code section 602 reads:
>
> "Except as provided in [Welfare and Institutions Code] Section 707, any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

This provision does not use the term "exclusive" and "assigns jurisdiction over all juvenile criminal matters to the juvenile court explicitly subject to the exceptions in Welfare and Institutions Code section 707." (*Cervantes, supra*, 9 Cal.App.5th at p. 598; accord, *Marquez, supra*, ___ Cal.App.5th at p. ___ [2017 Cal.App. LEXIS 440, *8].)

Welfare and Institutions Code section 707 applies to "a minor . . . alleged to be a person described in [Welfare and Institutions Code] Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age." (*Id*., subd. (a)(1).) Subdivision (b) lists 30 qualifying offenses, including murder. (See *id.*, subd. (b).)

" '[F]or crimes that qualify the juvenile offender for transfer to adult court, subject matter jurisdiction is concurrent between the criminal division and the juvenile division. 'The juvenile court and the criminal court are divisions of the superior court, which has subject matter jurisdiction over criminal matters and civil matters, including juvenile proceedings. [Citation.] When exercising the jurisdiction conferred by the juvenile court law, the superior court is designated as the juvenile court. [Citation.] Accordingly, when we refer . . . to the jurisdiction of the juvenile court or the jurisdiction of the criminal court, we do not refer to subject matter jurisdiction, but rather to the statutory authority of the particular division of the superior court, in a given case, to proceed under the juvenile court law or the law generally applicable in criminal actions. [Citation.]' " (*Cervantes*,

a particular function in the judicial process" (*Cervantes, supra,* 9 Cal.App.5th at p. 602); it does not "redefine, to the benefit of defendants, conduct subject to criminal sanctions" (*Tapia v. Superior Court, supra,* 53 Cal.3d at p. 301), "resemble [a] clear-cut reduction in penalty [as] in *Estrada*" (*Cervantes, supra,* at p. 601), or otherwise "represent a judgment about the needs of the criminal law with respect to a particular criminal offense" (*Brown, supra*, at p. 325). Moreover, while the "procedural changes implemented by Proposition 57" (*Cervantes, supra*, at p. 601) "*may* have the effect of reducing the punishment in some cases because, unlike adult court sentences, the longest that juvenile court jurisdiction generally extends is until the juvenile offender is 25 years old" (*Mendoza, supra,* 10 Cal.App.5th at p. 348, italics added; see Welf. & Inst. Code, § 607, subd. (b)), "we may presume that many cases filed in juvenile court will still end up in adult court (with adult penalties) under Proposition 57, after the fitness hearing is held" (*Cervantes, supra,* at pp. 601-602). (See *Mendoza, supra,* at p. 348 ["Proposition 57 provides no certainty that a minor will actually receive a mitigated penalty because juvenile courts have discretion under Proposition 57 to transfer juvenile cases to adult court. (Welf. & Inst. Code, § 707, subd. (a)(2).) If a case is transferred to adult court, the penalty for all offenses will be the same as they were before Proposition 57."].) Were we to widen the scope of the *Estrada* rule in the manner proposed by defendant, we would—in direct contravention of the Supreme Court—"endanger the default rule of prospective operation." (*Brown, supra,* 54 Cal.4th at p. 324.)[22]

Defendant suggests Proposition 57 constitutes an affirmative defense. "An affirmative defense is one which does not negate an essential element of a cause of action

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supra, 9 Cal.App.5th at p. 598; accord, *Marquez, supra,* ___ Cal.App.5th at p. ___ [2017 Cal.App. LEXIS 440, *8].)

[22] We are aware the Fourth Appellate District, Division Three, reached a contrary conclusion. (*People v. Vela* (2017) 11 Cal.App.5th 68.) In an earlier case, we rejected that court's analysis. (See *Marquez, supra,* ___ Cal.App.5th at pp. ___-___ [2017 Cal.App. LEXIS 440, *16-*17].)

or charged crime, but instead presents new matter to excuse or justify conduct that would otherwise lead to liability." (*People v. Noble* (2002) 100 Cal.App.4th 184, 189.) Nothing in Proposition 57 excuses, justifies, or decriminalizes the illicit conduct at issue. (Cf. *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785-786; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1543-1545 [retroactive application of medical marijuana defense].)

DISPOSITION

The judgment is affirmed.

_____
DETJEN, J.

WE CONCUR:

_____
HILL, P.J.

_____
MEEHAN, J.